No. 79-792

In the Supreme Court of the United States

OCTOBER TERM, 1979

HIATT GRAIN & FEED, INC., PETITIONER

v.

BOB BERGLAND, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner challenges the Secretary of Agriculture's 1977 decision to grant price support for wheat and feed grains to cooperatives on behalf of their farmer-members. Both the district court, 446 F. Supp. 457 (D. Kan. 1978), and the court of appeals, 602 F. 2d 929 (10th Cir. 1979) (Pet. App. A1-A10), upheld the Secretary's decision. There is no reason for this Court to consider the issue.

1. The price-support program ensures that participating farmers receive a minimum price for their crops despite the uncertainties of the market place. Typically, under the price-support loan program, the government extends to the farmer a non-recourse loan secured by the farmer's crop, which is valued at a

predetermined price-support level. If the market price rises sufficiently above the predetermined price-support level to cover interest and storage charges, the farmer repays the loan, sells his crop at the market price, and keeps the sale proceeds. If the market price does not rise sufficiently, the farmer may retain the loan proceeds, whereupon the government takes title to the crop.

In order to gain access to the grain-export trade, some farmers have agreed to "pool" their grain in large amounts. These grain pools are administered by farmer-owned cooperatives, which make the marketing decisions for the pooling farmers. At one time, price supports were unavailable to such farmers because, once they delivered their grain to the pools, they had no collateral to secure the loans. In August 1977, however, after a public rulemaking proceeding, the Secretary of Agriculture promulgated new regulations permitting grain farmers participating in grain pools administered by approved cooperatives to obtain price-support loans through their cooperatives. See 7 C.F.R. 1421.3(g) and 1425, amended at 42 Fed. Reg. 40175 *et seq.* (Aug. 9, 1977) (Pet. App. A13-A27). Under the regulations, cooperatives must pass on the loan proceeds to the farmers within a short time after receiving the loans. Such loans to cooperatives on behalf of farmers, known as "Form G loans," have long been employed for a variety of agricultural commodities (*e.g.*, cotton, rice, peanuts, and soybeans). The Secretary's new regulations simply extend the "Form G" program to wheat and feed grains.

Petitioner, a private grain dealer, filed this class action seeking to invalidate the "Form G" program for wheat and feed grains. Petitioner challenged the program on numerous grounds arising under the Constitution, the

Administrative Procedure Act, and various environmental and agricultural statutes. The courts below rejected all of petitioner's contentions. In this Court, petitioner claims only that the Secretary lacked the statutory authority to extend non-recourse "Form G loans" to cooperatives for the benefit of their farmer-members.

2. This issue of statutory authority does not warrant further review. There is no conflict among the circuits on the issue, and the court of appeals' decision that the Secretary possessed the requisite authority is correct. The Agricultural Act of 1949, as amended, simply requires the Secretary of Agriculture to "make available" price support to "producers" of wheat and feed grains (*i.e.*, farmers). See 7 U.S.C. 1441 and 1444b.[1] The "Form G" program plainly does that. The regulations "make available" price support to wheat and feed grain farmers engaged in pooling by granting loans to farmer cooperatives and by requiring that the loan proceeds be passed through to the farmers themselves within 15 days. 7 C.F.R. 1425.14(a) (Pet. App. A27).

Price support obviously can be "made available" to farmers in a variety of ways, including, as here, the channeling of price support to farmers through cooperatives. Contrary to petitioner's repeated claim (Pet. 7-13), the Act nowhere confines the Secretary to one method of price support, *i.e.*, providing support directly to farmers. Indeed, aside from the open-ended "make available" language, the Act directs the Secretary

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[1]Section 1441, which is applicable to wheat and corn, see 7 U.S.C. 1428(c), requires that price support be made available to "cooperators." The term "cooperators" is statutorily defined as "producers," 7 U.S.C. 1428(b), which in essence means farmers. Section 1444b, applicable to other feed grains, provides directly that price support be made available to "producers."

to provide price support "through the Commodity Credit Corporation and *other means available to him*." 7 U.S.C. 1421(a) (emphasis supplied). In addition, 7 U.S.C. 1421(b) provides that "the amounts, terms, and conditions of price support operations and the extent to which such operations are carried out shall be determined or approved by the Secretary." Cf. 15 U.S.C. 714b(d), 714b(j), 714b(*l*), and 714j. Unquestionably, then, Congress delegated to the Secretary the power to design the price-support program as he deems necessary and appropriate.

Moreover, as the court of appeals emphasized (Pet. App. A8-A10), the Secretary has permitted Form G-type loans for various commodities since the inception of the Agricultural Act of 1949. This longstanding and contemporaneous agency interpretation of its own enabling legislation should not be disturbed absent "compelling indications" that the agency is wrong. See *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965).[2] The agency practice takes on particular weight where, as here, "Congress has revisited the Act and left the practice untouched." *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974).[3] Accordingly, there is no justification here for

[2]This is not a case like *SEC* v. *Sloan*, 436 U.S. 103 (1978), or *TVA* v. *Hill*, 437 U.S. 153 (1978), where agency constructions were disregarded in the face of clear statutory language contrary to the agency view. Here, petitioner points to no statutory provision inconsistent with the Secretary's interpretation of his statutory authority.

[3]As the court of appeals noted (Pet. App. A10), Congress has been aware of the Secretary's Form G-type practice from the outset but has never questioned its validity. See, *e.g.*, H.R. Rep. No. 1790, 80th Cong., 2d Sess. 6 (1948); 123 Cong. Rec. S 8294 (daily ed. May 23, 1977) (remarks of Sen. Humphrey). Congress has also taken account of the practice in appropriations Acts. See, *e.g.*, 73 Stat. 167, 177-178 (1959); 105 Cong. Rec. 12234, 12237, 12239-12240 (1959).

Petitioner attempts to diminish the significance of the agency's prior Form G-practices by suggesting that the prior Form G "loans have purportedly been made under statutes other than 7 U.S.C. § 1441" (Pet. 11). But that is not the case. Section 1441 is the statute that "authorizes and directs" price support for all "basic" agricultural commodities, which include cotton, tobacco, and peanuts (as well as wheat, rice, and corn). 7 U.S.C. 1428(c). And all of these commodities, over the years, have been made eligible for Form G-type price-support loans, with Section 1441 always cited as the agency's statutory authority. See, *e.g.*, 7 C.F.R. 1427.25 (cotton); 20 Fed. Reg. 3525 *et seq.* (1955) (tobacco); 18 Fed. Reg. 5055 *et seq.* (1953) (peanuts).

overturning the Secretary's regulations. See *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 372-373 (1973).

Finally, there is nothing to petitioner's contention that the Secretary's Form G-regulations violate 7 U.S.C. 1425 because the regulations permit non-recourse loans. Section 1425 provides merely that "[n]o producer shall be personally liable for any deficiency arising from the sale of the collateral securing any [price support] loan * * *." In *Tennessee Burley Tobacco Growers' Ass'n* v. *Commodity Credit Corp.*, 350 F. 2d 34 (1965), cert. denied, 383 U.S. 907 (1966), the Sixth Circuit ruled that a tobacco cooperative could not obtain government reimbursement for alleged deficiencies arising from the sale of price-support collateral, because a cooperative is not a "producer" entitled to the protection of 7 U.S.C. 1425. But, contrary to petitioner's view (Pet. 13-16), neither Section 1425 nor *Tennessee Burley* calls into question the validity of the Secretary's current Form G-regulations. Section 1425, as interpreted in *Tennessee*

Burley, simply offers statutory protection to the personal assets of farmers but not the assets of other entities. The section does not purport to bar agency regulations permitting non-recourse price-support loans to cooperatives on behalf of farmers.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[4]In *Tennessee Burley* itself, the government bore a deficiency of over $1,000,000 in the sale of its collateral on price-support loans to a tobacco cooperative. 350 F. 2d at 39. The court of appeals did not suggest that recourse could be had against the cooperative for this amount. The court also did not question the validity of the Form G-type price-support programs involved in *Tennessee Burley*.